IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

JULIA C. MILLER, Administratrix of the Estate of Ernest F. Miller, Deceased,
Respondent.

No. 433

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

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Cases Cited.

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to the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered July 1, 1942, rehearing in which and motion to transfer to said court en banc were denied July 28, 1942, by Division No. 1 of the court below, in this cause lately there pending, styled Julia C. Miller, Administratrix of the Estate of Ernest F. Miller, Deceased, Respondent, v. Terminal Railroad Association of St. Louis, a Corporation, Ap-

pellant, No. 37,976, on the docket of the court below, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of respondent and against your petitioner herein.

Your petitioner further states that on August 1, 1942, it presented to the Clerk of the Supreme Court of Missouri, En Banc, for filing, its motion in said court en banc to transfer said Cause No. 37,976 from Division No. 1 of said court to said court en banc, but that said clerk of said court en banc, upon order of said court below so to do, refused to accept or file said motion in said court en banc.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Julia C. Miller, administratrix of the estate of Ernest F. Miller, deceased, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, which is by this petition sought to be reviewed, appears on pages ... to ..., inclusive, of the printed transcript of the record filed herein, will be found in 163 S. W. (2d) 1034, but has not yet been published in the official reports of the Supreme Court of Missouri.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing for review in this court by certiorari of decisions of the highest courts of the several states wherein a title, right, privilege or immunity especially set up is claimed under a statute of the United States. Authorities sustaining the jurisdiction are: Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635,

58 L. ed. 1062; Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. ed. 335; Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370; Atlantic Coast Line Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. ed. 601; Steeley v. Kurn et al., 313 U. S. 256, 61 S. Ct. 934.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act) (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover from petitioner damages sustained by her (there were no minor children) as a result of the death of her husband, Ernest F. Miller, on July 12, 1940, in the State of Illinois, from injuries he sustained while acting within the scope of his employment by petitioner as a brakeman on the rear end of one of petitioner's trains when a rear end collision occurred between petitioner's train and a train operated by Receivers of the Mobile & Ohio Railroad Company (hereafter referred to as M. & O.) on the east approach of the Eads Bridge, which connects East St. Louis, Illinois, and St. Louis, Missouri.

Respondent pleaded and relied upon general negligence, and submitted her case upon res ipsa loquitur (R. 3, 51, 52).

At the trial it was stipulated that both petitioner and decedent were engaged in interstate transportation and consequently were subject to the provisions of the Federal Employers' Liability Act (R. 8).

The place of accident was within the yard limits of petitioner, over whose track, together with the switches, signals, and appliances in connection with it (R. 12), petitioner's train and the train of the Receivers of the Mobile & Ohio Railroad Company, now the Gulf, Mobile and Ohio

Railroad Company (hereinafter called the M. & O.), were moving (R. 9). Petitioner had promulgated certain rules governing the movement of all trains passing over its tracks (R. 10); and was physically in control of its train upon which decedent was riding, but was not physically in control of the M. & O. train (R. 9).

The Receivers of the Mobile & Ohio Railroad Company were, and had been since their appointment, operating their passenger train over this track with petitioner's knowledge and consent, for the use of which they paid petitioner the same compensation as was paid by any other railroad company or operator of a railroad who used the track in the same way (R. 11).

All of the above facts are stipulated by the parties.

On the merits respondent offered in evidence only the testimony of conductor Chrisman of the M. & O. train, who swore that (R. 15) while passing over the east approach of Eads Bridge in East St. Louis, Illinois, at about fifteen miles an hour (R. 16), he looked ahead of his train and saw appellant's freight train standing still (R. 17) on the same track upon which his train was running and only about 180 feet ahead of his own train (R. 15); he saw decedent standing on the west drawbar of the rear car of the freight train, and saw him leisurely give one stop signal (R. 17). Decedent may have given more than one stop signal, but Chrisman saw him give only one (R. 18).

Chrisman immediately turned and reached for one of the brake valves located on the rear platform, intending to set the air and stop his train; but before Chrisman could reach the air valve the M. & O. engineer applied the air from his air brake valve in the locomotive (R. 16). At that time the passenger train was moving at ten, twelve or fifteen miles an hour; and its speed was reduced considerably between that time and the time of the collision, possibly half, possibly more; the witness could not say (R. 16, 17).

The passenger train was not stopped, it crashed into the rear end of appellant's train and killed Ernest F. Miller, respondent's decedent, at a point on the east approach of Eads Bridge (R. 23).

Petitioner's rule 308 reads as follows:

> "In fog or storm and when view is otherwise obstructed, enginemen and trainmen must be especially alert and move trains under such control as to insure stopping within a distance track is known to be clear. In case of accident responsibility will rest with moving train" (R. 21).

Chrisman said that "running a train under control" means running it at such speed as to be prepared to stop within the distance one can see ahead (R. 24). He had no information that appellant's train was running ahead of his train, either by word of mouth, signal or any other method; nor did he ordinarily get such signals. When a train is running within yard limits, as this one was (R. 19), those in charge of it must be prepared to stop within the distance they can see ahead, no matter where it is (R. 25). Such a rule or custom of keeping a train under control while operating within yard limits had been in effect during the eighteen years Chrisman had been running trains over petitioner's lines (R. 25).

From the time any train traveling east passes Washington Avenue station west of the point of accident until after it passes the point of accident there is no way by which any of petitioner's employees can stop or warn it or control its movement. The M. & O. engineer was, therefore, "on his own" after passing Washington avenue (R. 45, 46); the dispatcher at Washington avenue could not reach him with any order or signal to stop; it was "up to him to look for trains ahead" (R. 46).

Under the conditions present at the time and place of decedent's fatal injury it was not customary for decedent

(the rear switchman) to get off, go back and flag the M. & O. train (R. 34); "he couldn't very well go back to flag" (R. 35).

Petitioner's uncontradicted evidence shows that the M. & O. engineer could have seen petitioner's train from a point 1,890 feet away (R. 39), but could not determine which of two tracks it was on; that when he reached a point 558 feet from petitioner's train he could see decedent on the rear end of the train, could determine that petitioner's train was on the same track over which he was moving (R. 39) and he could have stopped his train within ninety to a hundred feet with safety to his passengers (R. 40).

On April 10, 1874, articles of association for Union Depot Company were filed. The purpose of such incorporation was to "construct, establish and maintain a union station," and lay whatever tracks were necessary to make that station accessible to railroad lines in St. Louis (R. 29).

February 20, 1880, Terminal Railroad of St. Louis was organized, its purpose being to construct, maintain and operate tracks and termini in St. Louis connected with the tracks and facilities of the railroads therein named, and of other railroads, "the general object and purpose being to provide the most ample and convenient connections, accommodations and terminal facilities in St. Louis for all railroads now entering, or hereafter to enter, the same, and all individuals and companies doing business with said railroad (R. 30, 31).

July 26, 1889, Union Railway & Transit Company of St. Louis and Terminal Railroad of St. Louis consolidated under the name of Terminal Railroad Association of St. Louis (R. 31, 32).

Later appellant became the owner of the rights and properties of Union Depot Company (State ex inf. v. Terminal Railroad Ass'n of St. Louis, 182 Mo., l. c. 292).

QUESTIONS PRESENTED.

I.

The ultimate question is: Can there be a recovery under the Act in the conceded absence of the conventional relation of employee and employer between the injured person and the one whose sole negligence produced the injury?

If the answer to this question is negative, the judgment of the court below cannot stand, because it based its opinion upon the ground that "the local law of Illinois made the employees of the M. & O., in law, the employees of defendant in so far as concerns responsibility for the death of Miller" (Opinion, p. 8).

To reach an answer other subsidiary questions must be considered:

(a) Does the act define "employee," "employer," "employed" and "agent"?

(b) If it does not, is the law which does define them substantive or procedural?

(c) If it is substantive the federal rule governs; if it is procedural the law of the forum governs.

(b) Has this Court defined the terms, and if so are its decisions decisive here?

II.

Assuming an affirmative answer to the ultimate queston propounded, supra, it must be based upon the principle that a railroad which voluntarily permits another railroad to move over its tracks becomes liable for the latter's acts because the lessor is not itself voluntarily fulfilling its franchise obligation to operate its railroad, but is doing it through the agency of the company which it per-

mits to use the line. For convenience we hereafter refer to this theory as the "lessor-lessee rule."

But petitioner is not a "line-haul" railroad. It is a union station and terminal railroad company organized exclusively for operating and does operate a union station common to all railroads, together with tracks and facilities "to provide the most ample and convenient connections * * * for all railroads" (R. 30, 31). Consequently, in permitting all "line-haul" railroads to use its station and other facilities, petitioner is strictly fulfilling its franchise obligations in the only legally possible manner, and is not evading a single franchise responsibility. The reason then for the existence of the lessor-lessee rule does not apply to petitioner. Is the rule applicable under these circumstances?

III.

Assuming that the reason given in II, supra, does not take petitioner out from under the application of the assumed general lessor-lessee rule, is it excepted from its operation by this Court's decree compelling it to permit all railroads who so desire to use its facilities upon the same terms?

IV.

Is res ipsa loquitur applicable here, in view of the uncontradicted evidence that decedent was killed by the sole negligence of the M. & O. engineer who was exclusively in physical control of the train which caused Miller's death?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Decedent was in petitioner's employ under such circumstances as to make the act applicable to any action he or his personal representative might bring against petitioner to recover damages for his injury or death, respectively. In other words, recovery must be had if at all in accordance with the act.

I.

There are two primary requisites to a recovery under the act: (1) An employee-employer relationship between the parties, and (2) negligence, "in whole or in part," on the part of the employer-defendant. The first is shown by this record, the second is not. Moreover, this record not only fails to show defendant's (petitioner's) negligence, but shows affirmatively its freedom from negligence, and that decedent's death was caused solely by the negligence of the engineer of the M. & O., which was not a defendant.

Therefore respondent failed to make a case under the act, because she failed to show the existence of a conventional employee-employer relation between petitioner and the engineer of the M. & O., whose negligence was the sole cause of Miller's death.

II.

The act does not define "employee," "employer," "employed," or "agent." Consequently we must go elsewhere to find the meanings of these terms. Because the action is based upon a federal statute, we must go to the federal decisions unless the question is procedural. Obviously, as the question of who is an employee or agent under the act is one which goes directly to the right to maintain the action, it cannot be denied that it is a question of substance, rather than procedure. Therefore, the federal deci-

sions are determinative as to who is an "employee" or "agent" under the act.

This Court has held that "employee" as used in the act means an employee in the conventional sense, that is, a relation established by contract, express or implied, between the parties. This necessarily excludes any legalistic concept that the engineer of the M. & O. was an employee of the petitioner, by reason of the lessor-lessee relationship between petitioner and the M. & O.

III.

But if we should assume that ordinarily the lessor-lessee relationship has the legal effect of making the lessee's employees the lessor's employees, even under the act, and despite the decisions of this Court, nevertheless, petitioner, as a union depot and unified terminal company, is excepted from the operation of that general rule: First, because it is organized and operated as a union depot and unified terminal company for the very purpose of furnishing facilities to user lines, thereby avoiding a multiplicity of railroad tracks and terminals, conserving space, and facilitating the interchange of passengers and freight in congested areas; and, second, because this Court has compelled petitioner to permit any railroad which so desires to use its facilities upon equal terms with all other users, and has directed petitioner to act as the impartial agent of all user lines of railroad. Therefore, it is not only fulfilling the duties laid upon it by its franchises as a union depot and unified terminal company, but is acting under compulsion of this Court as the impartial agent of all of its user lines, and as such agent cannot be responsible for its principals' negligence.

IV.

Neither party to this action disputed any of the other's evidence. Consequently every fact herein mentioned is either admitted or not denied.

Decedent was in the employ of petitioner. The proximate cause of his death was the gross negligence of the M. & O. engineer in failing to stop his train before it collided with petitioner's train, although he had at least five times as much distance as he needed to stop. Petitioner had no possible way to compel him to stop. Admittedly (R. 9) the M. & O. was and petitioner was not in physical control of the M. & O. train, and petitioner was in physical control of its train upon which decedent was riding. Moreover, the undisputed evidence shows that petitioner had no means of signaling the M. & O. engineer from the time his train passed a point west of the place of accident until it reached a point east of the place of accident. Between these two points, as one witness expressed it, the M. & O. engineer was "on his own" (R. 45, 46). It is manifest that there was no occasion for signaling the engineer, as he could see petitioner's train on the track ahead of him when he had at least five times the space required to stop. There is no better signal or warning to stop than a train ahead on the same track. Thus it is obvious that the engineer of the M. & O. was in exclusive physical control of that train, and the happening or avoidance of the collision with petitioner's train was exclusively in his hands. It is equally obvious that petitioner not only was not, but the M. & O. was, exclusively in control of the instrumentality which caused decedent's death. Consequently, the primary basis for the existence of the res ipsa loquitur doctrine is not here shown. That theory is based fundamentally upon the premise of exclusive possession and control by defendant: One in exclusive possession and control of the instrumentality causing the damage is better qualified to speak of the cause of the abnormal action of such instrumentality; defendant had such exclusive possession and control; therefore, he is in a better position to show that such abnormal action did not result from his negligence than is

plaintiff to show that it did result from defendant's negligence. But when the major premise (exclusive possession and control by defendant) is not shown, then inevitably the conclusion cannot follow.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of Julia C. Miller, administratrix of the estate of Ernest F. Miller, deceased, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that Court's No. 37,976, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated July 1, 1942 (the motion for rehearing and motion to transfer to court en banc, denied July 28, 1942), shall be reversed and that petitioner shall have such relief as to this Court shall seem appropriate.

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